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No. 03-939

Supreme Court, U.S.
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In The
Supreme Court of the United States

VICTOR DIAZ, ET AL.,
[FORMERLY ODILON CHACHO COTO, ET AL.],

Petitioners,

v.

J. RAY McDERMOTT, S.A., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal For The Fourth Circuit Of The State Of Louisiana

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, allegedly injured seamen, brought an action in a Louisiana state court pursuant to the "saving to suitors clause" seeking damages under the Jones Act and the general maritime law. Respondents contend that prior to bringing suit, Petitioners freely and voluntarily settled their claims and executed releases with a full understanding of their legal rights. Under Louisiana law, an exception of *res judicata* is the proper procedural device for determining the validity of a release and may be heard by the court in advance of trial. Respondents filed exceptions of *res judicata* which were set for hearing by the trial judge who held that substantive maritime law would be applied to determine the validity of the releases.

Petitioners were denied supervisory writs by the Louisiana Fourth Circuit Court of Appeal and by the Louisiana Supreme Court. Therefore, the questions presented for review are (1) whether Petitioners have properly invoked the *certiorari* jurisdiction of this Court, and (2) whether Louisiana procedural law applies to this Jones Act and general maritime law action filed in a Louisiana court under the saving to suitors clause.

CERTIFICATE OF INTERESTED PARTIES

The Petitioners do not accurately list the parties to the proceeding. While the caption lists McDermott Underwater Services, Inc. as a respondent, there is no such entity. The named defendants in the court below include, but are not limited to, McDermott International, Inc., McDermott Inc., J. Ray McDermott, S.A., J. Ray McDermott, Inc., Offshore Petroleum Divers, Inc. and Insurance Company of North America, Inc. (hereinafter McDermott Respondents).

In compliance with Rule 29.6, Respondents offer the following:

McDermott International, Inc. has no parent company. The following are non wholly-owned subsidiaries of McDermott International, Inc.: P.T. Babcock & Wilcox Indonesia; MacShelf Ltd.; J. Ray McDermott, S.A.

McDermott Inc.'s parent company is McDermott International, Inc. McDermott Inc. does not have any non wholly-owned subsidiaries.

J. Ray McDermott, S.A.'s parent company is McDermott International, Inc. J. Ray McDermott, S.A. has the following non wholly-owned subsidiaries: McDermott Servicos de Construcao, Ltda.; P. T. Bataves Fabricators; Malmac Sdn. Bhd.; McDermott Abu Dhabi Offshore Construction Company; McDermott Arabia Company Limited; Initec, Astano y McDermott International Inc., S.A.

J. Ray McDermott, Inc. (formerly OPI International, Inc.) has J. Ray McDermott Holdings, Inc. as its parent company. J. Ray McDermott, Inc. has the following non wholly-owned subsidiaries: WD 140 Platform LLC; TL Marine Sdn. Bhd.

CERTIFICATE OF INTERESTED PARTIES – Continued

Offshore Petroleum Divers, Inc.'s parent company is J. Ray McDermott, Inc. Offshore Petroleum Divers, Inc. does not have any wholly-owned subsidiaries and was dissolved on August 21, 1998.

Insurance Company of North America, Inc. was the primary insurer of J. Ray McDermott, Inc.

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JURISDICTION

The McDermott Respondents contest Petitioners' assertion of jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioners concede that they seek review of a state trial court procedural decision which does not constitute a final judgment or decree rendered by the highest court of the state in which a decision could be had. (Petitioners' Brief at p. 7, n. 4). Petitioners seek to expand this Court's "pragmatic approach" to jurisdiction but fail to recognize that such an approach is not meant to "swallow the rule" of finality and is strictly reserved for most extraordinary circumstances where important constitutional or federal policy is being eroded. R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 3.5 at 146 (8th ed. 2002), citing *Flynt v. Ohio*, 451 U.S. 619 (1981).

Contrary to Petitioners' assertion, this Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994), is not pertinent to the issue of jurisdiction presented here. In *Miller*, the Louisiana trial court dismissed the plaintiff's suit under the federal maritime law doctrine of *forum non conveniens*; Miller appealed as of right to the Louisiana Fourth Circuit which affirmed. The Louisiana Supreme Court, the highest court of that state, reversed and held that Louisiana's procedural limitations on the doctrine of *forum non conveniens* in Jones Act and general maritime law cases was not preempted by substantive maritime law. The Louisiana Supreme Court conclusively decided the issue of *forum non conveniens* and its judgment on that federal maritime law issue was deemed final notwithstanding its remand of the case for trial. *Cox Broadcasting Corporation v. Cohen*, 420 U.S. 469, 477 (1975); *see also*, R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 3.7 at

150-57 (8th ed. 2002). In the present case, Petitioners were merely denied supervisory writs by the Louisiana Fourth Circuit Court of Appeal and by the Louisiana Supreme Court; there is simply no final judgment or decree to satisfy the *certiorari* jurisdiction requirements of 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Statement of Facts

This litigation arises out of the sinking of the DLB-269 in the Bay of Campeche off the coast of Mexico on October 15, 1995. The DLB-269 was owned and operated by CCC,[1] a Mexican corporation which performed offshore oil field services for Pemex, the Mexican national oil company. Eleven of the twelve Petitioners in this litigation were employed by J. Ray McDermott Inc. as dive crew members aboard the DLB-269. The twelfth Petitioner, Cortes, is a Mexican national who was aboard the vessel as a pipeline welder employed by CCC through CIC,[2] a Mexican labor supply company.

While J. Ray McDermott Inc. held a minority stock interest in CCC, McDermott's only involvement with the DLB-269 was its contract with CCC to provide divers and diving support personnel (twenty in number) to the DLB-269 through its division known as McDermott Underwater

[1] Respondent CCC Fabricaciones y Construcciones, S.A. de C.V.

[2] Respondent Corporacion de Industrias Construcciones, S.A. de C.V.

Services. The McDermott diving contingent aboard the vessel performed diving operations in support of the vessel's pipe laying activities. CCC's barge captain and barge superintendent were responsible for the navigation and operation of the vessel. The crew of the DLB-269 totalled approximately 250, most of whom were Mexican nationals employed by CCC through CIC.

During the period in question, the DLB-269 was towed by the M/V CAPTAIN JOHN and the M/V NORTH CAROLINA which served as towing and assist vessels directed by CCC's barge captain and barge superintendent pursuant to a charter between Northbank Towing, Inc. and CCC. Because of adverse weather from Hurricane Opal, the DLB-269, under the direction of CCC's barge captain (Cantu) and barge superintendent (Lobb), picked up anchors and towed away from the field to ride out the storm as was CCC's customary and usual procedure. The decisions of Cantu and Lobb were approved by Joe Perot, CCC's shoreside operations manager. After the pass of Hurricane Opal without incident to the barge or its crew, the DLB-269 returned to the Bay of Campeche and resumed oil field operations on October 6, 1995.

By October 9th tropical storm Roxanne was in the process of moving from the northwest Caribbean toward the southern Gulf of Mexico. On October 10th the DLB-269 picked up anchors to get under tow due to the approach of Hurricane Roxanne. Again, this decision was made by the barge captain Cantu and the superintendent Lobb and was discussed with Perot, CCC's shoreside operations manager. When Roxanne crossed the Yucatan Peninsula into the Bay of Campeche, it was downgraded to a tropical storm, passed near the barge on October 12th and continued its track toward the west. The DLB-269

remained under tow and weather conditions improved on the 13th. On October 14th a cold front was forecast to move southeast across the northern Gulf of Mexico; it was forecasted that the storm would strengthen to hurricane force but dissipate rapidly and weaken the following day.

Rather than dissipate, Hurricane Roxanne made a 180 degree turn toward the direction of the DLB-269 which remained under tow. On October 15th the vessel encountered heavy winds and high seas; the tow lines parted, and the barge anchors were dropped in an attempt to hold the bow into the seas but the vessel began to sink by the stern. In the late afternoon, life rafts were launched and the barge crew abandoned ship with the M/V CAPTAIN JOHN, the M/V NORTH CAROLINA and a third vessel, the M/V DUCKER TIDE, standing by.

Petitioners, as well as other crew members, were picked up by the assist vessels[3] and were taken into the port of Ciudad del Carmen where they showered, changed clothes and called home. After a brief stay in Mexico, each McDermott employee was provided travel expenses and was flown back to the United States where each returned to his respective home. Don Terry, Manager of McDermott's Diving Division, scheduled a meeting and banquet for the dive crew to be held at the Hyatt Regency in New Orleans on October 27th, twelve days after the sinking and after Petitioners had an opportunity to visit with family and friends. Terry had received word that some

[3] Contrary to the misleading assertion at page 3 of Petitioners' Brief, the McDermott Petitioners were picked up within one-to-four hours of abandoning ship; none sustained serious physical injury.

members of the dive crew had inquired about monetary compensation for their experience during Hurricane Roxanne and that others had been contacted by representatives of plaintiff attorneys. Because it was inevitable that the subject of settlement would be raised during the Hyatt meeting, Terry decided to initiate settlement discussions.

Terry addressed the dive crew at a noon meeting at the Hyatt on October 27th and first offered counseling or psychological assistance to any member of the dive crew who had psychological problems or concerns as a result of his experience in abandoning ship during Hurricane Roxanne. Terry instructed that anyone having psychological concerns should consult privately with J. J. Riddle, McDermott's Diving Safety Officer and Claims Manager who was present at the meeting.[4] Terry advised that he had authority from McDermott, without the necessity of involving its underwriters, to discuss settlement with any member of the dive crew who had not sustained physical injury. Terry stressed that no one was under any pressure to settle his claim.

At the conclusion of Terry's initial remarks, the dive crew was left alone to appoint a spokesman and determine whether they could arrive at a settlement figure acceptable to the members of the crew. The dive crew discussed

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[4] McDermott diver, Kris Nielsen, advised Terry of ongoing psychological problems and was not allowed to participate in settlement negotiations. Nielsen commenced psychiatric treatment and had not returned to gainful employment when his non-jury trial was held in March of 1998. Petitioners' reference to the *Nielsen* decision, page 4, n.1 of Petitioners' Brief, is of no consequence to the issue raised herein.

settlement figures and appointed diving supervisor and petitioner, Chuck Rountree, as their spokesman who submitted their settlement demand, $500,000 per man, which was unacceptable to Terry and McDermott. Terry told the crew to proceed with the banquet without further discussing settlement. At the conclusion of the meeting, petitioner Noble obtained information from Riddle that McDermott's deductible was $1.5 million. Noble and other members of the dive crew divided the deductible by twenty, the number of the dive crew, and concluded that McDermott would probably settle for $75,000 per man. Shortly after the meeting, Rountree approached Riddle and asked whether McDermott would pay $75,000 in settlement as he and other crew members would settle for that amount. After discussions with Terry, Riddle advised Rountree that McDermott would in fact pay $75,000 to those interested. Rountree reported that at least half of the dive crew would accept that settlement and arrangements were made to meet the following day with the McDermott attorneys to execute releases.

Later that evening, the banquet was held at the Hyatt as scheduled; food and alcoholic beverages were provided and a good time was had by the attendees. The following day, ten members of the dive crew appeared at McDermott's office for the purpose of settling their claims. Cline, Rountree, Diaz, Harris, Pheffer and Boettger, six of the Petitioners herein, settled on October 28th, the day after the banquet. Before executing a receipt and release, each was individually interviewed by legal counsel arranged through McDermott who provided a detailed and thorough explanation of each seaman's rights. The individual settlement interviews with Cline, Rountree, Diaz, Harris, Pheffer and Boettger were videotaped with their

consent. Harris, Pheffer and Boettger had been medically cleared and immediately returned to work while Cline and Rountree elected to take some weeks off before returning to work. Diaz was medically cleared to return to work but did not do so.

The video tapes establish that each petitioner was advised of his right to independent counsel and his right to bring suit against McDermott or any other entity involved in the sinking of the DLB-269. Each Petitioner acknowledged his understanding of his physical and emotional condition and each was advised of his right to recover damages for physical and emotional injuries. Each Petitioner was further advised that the release encompassed all injuries whether then known or later discovered. Each Petitioner was advised that he was under no obligation to settle and that he should not do so if he had any hesitation or doubt. Each Petitioner was encouraged to ask any question about any aspect of his legal rights, the terms of the settlement or the release document.

The video tapes confirm that each individual Petitioner was neither intoxicated nor otherwise mentally impaired. The video tapes further show that these six Petitioners were alert, coherent and perceptive. Their answers to questions directed to them were responsive and appropriate; their speech was articulate and their words were plainly enunciated. Each was placed under oath and acknowledged that he had a full understanding of his legal rights and his physical and emotional condition, that he had read and understood the release and that he was voluntarily settling his claim against all potential parties. Each executed a receipt and release and a confirming affidavit.

The other five Petitioners settled at later dates: Richins (10/30/95), Richard (11/2/95), Horschel (11/23/95), Noble (12/19/95) and Chauvin (1/30/96).[5] Again, each of the five was placed under oath and acknowledged that he had a full understanding of his legal rights as well as his physical and emotional condition, that he had read and understood the release and that he was voluntarily settling his claim against all potential parties. Each of the five executed a receipt and release and confirming affidavit and the release session was videotaped. Horschel, Noble and Chauvin each settled after having returned to work at their very same job.

Actions of the Trial and Appellate Courts

This suit was originally filed on behalf of Mexican nationals; twelve members of the McDermott dive crew were added as plaintiffs by supplemental and amending petitions. The McDermott defendants answered plaintiffs' suit and asserted the affirmative defense of compromise. The trial court granted McDermott's initial exception of no right of action and dismissed the Jones Act and general maritime law claims of the Mexican nationals with prejudice pursuant to Section (b) of the Jones Act, 46 U.S.C. § 688(b). Notwithstanding their request for trial by jury, the trial court made evidentiary findings in maintaining McDermott's procedural exception of no right of action. La.Code Civ. Proc. art. 931. The Louisiana Fourth Circuit Court of Appeal affirmed the dismissal of the claims of the

[5] Chauvin was not allowed to settle during the Hyatt meeting because he had a minor hip injury. Chauvin later settled for $85,000 after having been fully discharged from medical treatment.

Mexican nationals through the exception of no right of action. *Coto v. J. Ray McDermott, et al.*, 96-2701 (La. App. 4 Cir., 3/18/98), 709 So. 2d 1023. Writs on behalf of the Mexican nationals to both the Louisiana Supreme Court and the United States Supreme Court were denied. *Coto v. J. Ray McDermott, et al.*, 98-1443 (La. 10/16/98), 726 So. 2d 904; 526 U.S. 1050 (1999). There was never any question that the dismissal of the Jones Act and general maritime law claims with prejudice on the exception of no right of action deprived the Mexican nationals[6] of any right to trial by jury.

The remainder of the case, the claims of the Petitioners herein, then proceeded through discovery. The trial court granted summary judgment to the McDermott defendants and to the other defendants upholding the releases executed by the eleven McDermott Petitioners. The trial court found that the Petitioners were not improperly influenced or coerced by any of the events which preceded the signing of the releases during the videotaped sessions and that the Petitioners understood that their injuries may be or grow worse than they seemed to be. The trial judge further concluded that the Petitioners executed their releases with a full understanding of their legal rights and medical condition all in accordance with the maritime law established in *Garrett v. Moore-McCormack*, 317 U.S. 239, 248 (1942). Petitioners appealed that decision

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[6] These are the very same Mexican nationals who later filed suit in the Texas state court seeking recovery under Mexican law; their Texas state court suit is not based on the Jones Act or the U.S. general maritime law, a significant distinguishing factor not mentioned by Petitioners in reference to that case at pp. 5 and 7 of their Brief.

to the Fourth Circuit; a five judge panel held "the summary judgments rendered herein are reversed and set aside and the case is remanded to the trial court for further proceedings." *Coto v. J. Ray McDermott, S.A.*, 772 So. 2d 828 (La. App. 4 Cir. 2000) (McKay, J. dissenting and concluding " . . . defendants' summary judgment evidence satisfied the burden of establishing that each seaman freely and voluntarily executed his **release** with a full understanding of all his rights and as well as the consequences of the releases.") 772 So. 2d at 831-32.

When trial began on April 15, 2002, a continuance was required because of a press conference held by John O'Quinn, Petitioners' Texas counsel, which was broadcast that evening on television and the next morning by the print media, all in violation of Louisiana Supreme Court Rule 3.6, Trial Publicity, and to the substantial prejudice of defendants during jury selection. On September 9, 2002, the second trial of this matter began but a mistrial was granted on October 10th. While the mistrial was set aside by the Louisiana Fourth Circuit, the mistrial was reinstated by the Louisiana Supreme Court which noted that past and present prejudicial misconduct prevented Respondents from receiving a fair and impartial trial.

A status conference was held by the trial judge on December 16, 2002 for the purpose of selecting a trial date; the court queried counsel as to whether the seamen's releases could properly be determined by an exception of *res judicata* in advance of trial. The trial judge requested all parties file memoranda on the issue by January 14, 2003 and set a hearing on January 21st to determine whether the court would proceed with the exception of *res judicata* on February 10th. On January 14th, McDermott Respondents filed a memorandum citing authority that

the seamen's releases could properly be determined by an exception of *res judicata*. McDermott Respondents also filed separate Exceptions of *Res Judicata* as to the McDermott Petitioners on January 16th.

At the hearing of January 21st, the trial judge concluded that federal substantive maritime law applied to the validity of a seaman's release while state procedural law applied to a Jones Act case brought in state court. The trial judge held that the Louisiana Code of Civil Procedure article 929 provided that issues of releases could be tried by the court in advance of the trial through the exception of *res judicata*. The trial court exercised its discretion and set a bench hearing on the exceptions of *res judicata* for February 10, 2003. (Pet. App. 5, Appendix C).

Petitioners obtained a stay of the February 10th hearing and filed an Application to the Louisiana Fourth Circuit Court of Appeal for Supervisory Writ seeking reversal of the trial court's decision. On April 22nd, the Louisiana Fourth Circuit Court of Appeal denied writs noting that "the trial court properly exercised its discretion in setting defendants' exceptions of *res judicata* for separate, bench trial. See La.C.C.P. art. 929." (Pet. App. 1, Appendix A). On May 20, 2003 Petitioners filed an Application for Supervisory Writ to the Louisiana Supreme Court which denied the Writ Application on September 26, 2003. (Pet. App. 3, Appendix B).

REASONS FOR DENYING THE WRIT

Rule 10(b) Considerations

The McDermott Respondents respectfully submit that Petitioners' Writ of *Certiorari* does not warrant review under considerations of Rule 10(b) of the Rules of the Supreme Court. Petitioners initially assert that the procedural decision of the Louisiana trial court results in less favorable treatment to the Petitioners on an important issue than treatment afforded by a Texas state trial court to other seamen injured in the same incident. Neither the Louisiana trial court nor the Texas trial court are state courts of last resort as specified in Rule 10(b). Nevertheless, Petitioners further pursue the same argument at page 12 of their Brief and contend that the Petitioners herein are similarly situated to the plaintiffs in the Texas litigation. Petitioners' argument lacks candor.

The plaintiffs in the Texas state court litigation are the same Mexican nationals who were once plaintiffs in the Louisiana proceeding which is the subject of this Writ. The Jones Act and general maritime law claims of those Mexican nationals were dismissed with prejudice by the Louisiana trial court pursuant to Section 688(b) of the Jones Act.[7] That dismissal was affirmed by the Louisiana appellate court, *Coto v. J. Ray McDermott, et al.*, 96-2701 (La. App. 4 Cir., 3/18/98), 709 So. 2d 1023, and writs were denied by the Louisiana Supreme Court and by this Court.

[7] The Louisiana courts' dismissal of the Mexican nationals' suit was without prejudice to any claims under Mexican law which may be brought in Mexico. Respondents understand that a motion to dismiss on the basis of the Louisiana courts' judgment remains pending in the Texas litigation.

Coto v. J. Ray McDermott, et al., 98-1443 (La. 10/16/98), 726 So. 2d 904; 526 U.S. 1050 (1999). The Mexican national plaintiffs in the Texas litigation have asserted Mexican law claims which are subject to Texas state court procedure. Petitioners' Jones Act and general maritime law claims are subject to Louisiana procedural rules. Clearly, the Mexican national plaintiffs and the Petitioners herein are not similarly situated.

In this respect, Petitioners' reliance on *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (*per curiam*) is plainly misplaced. This Court granted *certiorari* in that case because of a conflict between the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Fifth Circuit regarding a substantive standard of federal law. Here, there is no conflict between two United States appellate courts nor is there any conflict between a Louisiana court of last resort and a United States court of appeals. *Certiorari* under Rule 10(b) is simply not warranted.

Rule 10(c) Considerations

The McDermott Respondents respectfully submit that Petitioners' Writ of *Certiorari* does not warrant review under considerations of Rule 10(c) of the Rules of the Supreme Court. The trial court's decision to apply substantive maritime law through the procedural exception of *res judicata* does not conflict with relevant decisions of this Court. Indeed, the trial court's decision is consistent with this Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), which held that federal maritime law does not preempt state procedural law in Jones Act cases filed in state court under the saving to

suitors clause, 28 U.S.C. § 1333(1). In *American Dredging Co. v. Miller*, this Court focused on Louisiana's procedural rule of *forum non conveniens* and held:

> Uniformity of process (beyond the rudimentary elements of procedural fairness) is assuredly not what the law of the admiralty seeks to achieve since it is supposed to apply in all the courts of the world.

510 U.S. at 453. A bench trial through Louisiana's exception of *res judicata* does not infringe upon the substantive right to recover and does not deprive any litigant of procedural due process. Nor is Louisiana's procedural exception of *res judicata* "a rule upon which maritime actors rely in making decisions about primary conduct – how to manage their business and what precautions to take." 510 U.S. at 454. Because Louisiana's exception of *res judicata* is one of procedure rather than substance, Petitioners erroneously contend that the trial court's decision is in conflict with decisions of this Court.

There can be no doubt that an exception of *res judicata* is the *proper Louisiana procedural* vehicle when a suit is barred by a valid, written compromise or transaction. *Ortego v. State Dept. of Transp. & Develop.*, 689 So. 2d 1358 (La. 1997); *Brown v. Drillers, Inc.*, 630 So. 2d 741 (La. 1994); *Rivett v. State Farm Fire & Cas. Co.*, 508 So. 2d 1356 (La. 1987); *Harris v. Caddo Parish School Bd.*, 2002 La. App. LEXIS 3816 (La. App. 2 Cir. 2002); *Priority E.M.S. v. Crescent City E.M.S.*, 2002 La. App. LEXIS 3207 (La. App. 4 Cir. 2002); *Louisiana Workers Compensation Corp. v. Betz*, 792 So. 2d 763 (La. App. 4 Cir. 2001); *Childs v. Woods*, 822 So. 2d 732 (La. App. 1 Cir. 2002).

Louisiana jurisprudence establishes that the hearing of an exception in advance of trial does not deny any litigant a right to trial by jury. In *Shell Oil Co. v. Kennedy*, 344 So. 2d 1153 (La. App. 4 Cir. 1977), the Louisiana Fourth Circuit Court of Appeal affirmed the trial court's determination of the validity of a mutual release contained in a termination agreement through an exception of *res judicata*. On appeal, Kennedy contended that the factual issue as to the validity of the compromise is one for the jury and should not have been decided by the judge in advance of a trial on the merits. Citing the Louisiana Supreme Court's decision in *Babineaux v. Pernie-Bailey Drilling Co.*, 262 So. 2d 328 (La. 1972), which held that a plaintiff is not denied the right to trial by jury because Louisiana's procedural system requires or permits certain issues to be decided by the judge alone in advance of trial, the Fourth Circuit rejected Kennedy's contention and stated:

> While an argument for presenting all factual issues to the jury contains considerable merit, our procedural system apparently contemplates the use of devices such as the peremptory exception to avoid full-scale trial of actions which may be finally determined by the trial in advance of a conveniently separable issue. In the present case a decision sustaining defendant's exception disposes of the entire case without the necessity of a lengthy trial of such issues as contract breach and damages.

334 So. 2d at 1154. The Fourth Circuit affirmed the trial court's actions in determining the validity of the compromise on the exception of *res judicata* in advance of a trial on the merits. That Louisiana's exception of *res judicata* is procedural in nature is sufficient for denial of the Petitioners'

Writ. The remainder of Petitioners' arguments are equally without merit.

Petitioners incorrectly argue that the Jones Act adopts FELA decisional law which requires trial by jury on release issues involving railroad workers. First, the Jones Act specifically incorporates " . . . all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees . . . 46 U.S.C. § 688(a)." For this reason, it has been recognized that the Jones Act: adopts FELA's three-year prescriptive period, 45 U.S.C. § 56; does not recognize the defense of assumption of the risk, 45 U.S.C. § 54; provides that contributory negligence is not a complete bar to recovery but merely diminishes recovery based upon the seaman's comparative negligence, 45 U.S.C. § 53; and prohibits removal of Jones Act suits brought in state court, 28 U.S.C. § 1445(a).

Second, and more importantly, releases executed by railroad workers are governed by a different legal standard (FELA decisional law) from those releases executed by Jones Act seamen. Compare, *Callan v. Pennsylvania Railroad Co.*, 332 U.S. 625 (1948) (railroad worker's releases) with *Garrett v. Moore-McCormack,* 317 U.S. 239, 248 (1942) (seamen's releases). A FELA railroad worker attacking the validity of his release bears the burden of proving the release to be invalid, while the Jones Act employer bears the burden of proof in establishing the validity of a seaman's release.

The FELA cases applicable to railroad workers are factually and legally inapplicable here. Under careful scrutiny, neither *Callan, supra*, nor *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952), supports

Petitioners' proposition that a seaman's release can only be determined by jury trial in a Jones Act suit brought in a state court. Clearly, *Callan* is not dispositive as there was never any question of whether the FELA liability issues, including the release, were to be tried to a jury in that federal court suit. The right to trial by jury in a federal court FELA action is mandated by the Seventh Amendment which is not binding on the states. In *Callan*, the district court removed the issue of the release from the jury under the erroneous assumption that there was no factual dispute as to the permanency of the railroad brakeman's injury which the district court further incorrectly concluded would invalidate the release. The federal court of appeal found reversible error under the facts relating to the release and the railroad's contention that the release was valid notwithstanding the permanency of the alleged injury.

However, the issue before the United States Supreme Court in *Callan* was not whether the release was a jury question but rather which party to the FELA action, the injured employee or the railroad, bore the burden of proof in establishing the validity, *vel non*, of the release. The Supreme Court rejected the argument that the same legal standard applicable to Jones Act seamen (*Garrett v. Moore-McCormack*) should be applicable to FELA railroad workers and held:

> . . . the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.

332 U.S. at 630. With respect to releases, *Callan* establishes that FELA substantive decisional law is not applicable in Jones Act cases.

Dice v. Akron Canton & Youngstown Railroad, supra, merely stands for the proposition that the validity of a release under the FELA is governed by federal law and not by an Ohio law contrary to that federal substantive law. There, the railroad denied negligence and asserted a release in defense of a railroad fireman's FELA negligence action brought in an Ohio state court. The trial judge entered a judgment notwithstanding the verdict and set aside the jury's verdict in favor of the fireman and found that the fireman's evidence did not support the allegation of fraud required to set aside the release. Before addressing Ohio's fragmented treatment of factual questions involving an allegedly fraudulent release, the Supreme Court first held that the validity of releases under the FELA raises a federal question to be determined by federal rather than state law. The Supreme Court next found that Ohio law was contrary to the substantive federal law:

> In effect, the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act. . . .

342 U.S. at 362.

Turning to the issue of jury trial, the Supreme Court observed that under Ohio's law, "the factual issue of fraud is thus split into fragments, some to be determined by the judge, others by the jury." 342 U.S. at 362. Because Ohio

law provided for jury trials of cases brought pursuant to the FELA, the Supreme Court held that Ohio could not "single out one phase of the question of fraudulent release for determination by a judge rather than by a jury." 342 U.S. at 362. *Dice* is clearly distinguishable from the case here where Louisiana's exception of *res judicata* does not result in fragmentation of factual issues between the judge and jury with respect to the validity of a seaman's release. This Court's decision in *Dice* clearly inferred that Ohio could have procedurally done away with jury trials in negligence actions, including an FELA action if it had seen fit to do so. 342 U.S. at 362, citing *Minneapolis and St. L.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

Accordingly, the United States Supreme Court has recognized that any state, in entertaining an action under the FELA, need not provide a jury system other than that established for local negligence actions and that states are not compelled to provide the jury required of federal courts by the Seventh Amendment. *Minneapolis and St. L.R. Co. v. Bombolis*, 241 U.S. 211 (1916). Stated differently, if a state has modified the common law requirement for trial by jury, a litigant must accept the jury system as he finds it in bringing his FELA suit in that state's court. *Minneapolis and St. L.R. Co. v. Bombolis, supra*. Because all negligence suits in Louisiana are treated the same way and by the same mode of disposition, Louisiana does not discriminate against FELA, or Jones Act suits for that matter. All civil suits in Louisiana, including Jones Act suits, are subject to the exceptions set forth in Louisiana Code of Civil Procedure. Nor does Louisiana's procedural law concerning jury trials make any inroad upon federal substantive law. *Parker v. Rowan Companies*, 599 So. 2d 296 (La. 1992), *cert. denied*, 506 U.S. 871 (1992). After all, Petitioners could have brought their Jones Act claims in

federal court if they were not content with Louisiana's procedural rules.

In 1992, the Louisiana Supreme Court and the U.S. Fifth Circuit Court of Appeals both considered the effect of former article 1732(6) of the Louisiana Code of Civil Procedure in a state court Jones Act suit brought pursuant to the saving to suitors clause; both courts independently held that a bench trial does not modify or displace essential features of the Jones Act or the substantive maritime law. *Parker v. Rowan Companies, supra; Linton v. Great Lakes Dredge & Dock Company*, 964 F.2d 1480 (5th Cir. 1992). This Court's decision in *Parker* is instructive and rejects Petitioners' argument that the right to trial by jury is substantive and not remedial or procedural:

> Defendant's alternative argument is that if 1732(6) is construed as encompassing Jones Act claims, then the statute itself violates the supremacy clause of the United States Constitution, the Seventh Amendment, and the provisions of 28 U.S.C. § 1333. The arguments which he uses to support these contentions do not persuade us. The Seventh Amendment's right to trial by jury in civil cases has not been extended to the states through the Fourteenth Amendment. *Olsen v. Trust Co. of Chicago*, 245 F.2d 522 (7th Cir.), *cert. denied*, 355 U.S. 896, 78 S.Ct. 270, 2 L.Ed.2d 193 (1957). *See also Letendre v. Fugate*, 701 F.2d 1093, 1094 (4th Cir. 1983) (citations omitted). A denial of a jury trial in a state court civil proceeding does not violate the due process clause. *Id.* Therefore, it is within the province of the states to establish their own rules for the availability of jury trials. This court, in *Lavergne v. Western Co. of North America, Inc.*, rejected the reverse-Erie argument, stating:

> It has long been established that a state court, having concurrent jurisdiction with the federal courts as to *in personam* admiralty claims, is free to adopt such remedies and attach to them such incidents as it sees fit so long as it does not attempt to modify or displace essential features of the substantive maritime law. . . . Affording a litigant a right to trial by jury in our state courts does not . . . modify or displace essential features of the substantive maritime law. As stated by Judge (now Justice) Blanche in *Hebert v. Diamond M. Company*, [367 So. 2d 1210 (La. App. 1 Cir. 1978)], '[a] jury trial is simply a method of enforcing substantive rights. *As such, it is purely remedial . . .*'
>
> 371 So. 2d 808, 810 (La. 1979) (citations omitted). Similarly, granting a Jones Act seaman a right to a state court bench trial does not "modify or displace essential features of the substantive maritime law."

559 So. 2d at 301 (emphasis added). This same rationale and the remedial nature of a jury trial reinforces the trial court's decision to hear the release issue in advance of trial under Louisiana's procedural exception of *res judicata*.

Just after the *Parker* decision was issued, the U.S. Fifth Circuit Court of Appeals held that a non-jury trial in a Jones Act suit brought in a Louisiana court pursuant to the saving to suitors clause did not infringe upon the Jones Act or the general maritime law. *Linton v. Great Lakes Dredge & Dock Co., supra*. The *Linton* court noted that the United States Supreme Court had addressed

state court concurrent jurisdiction in Jones Act and general maritime law cases and held:

> . . . a state, having concurrent jurisdiction, is free to adopt such remedies and to attach to them such incidents, it sees fit so long as it does not attempt to make changes in the substantive maritime law.

964 F.2d at 1486, citing *Madruga v. Superior Court*, 346 U.S. 556 (1954); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 190 (1924). Interpreting the Louisiana Code of Civil Procedure, and relying on *Madruga* and *Red Cross Line*, the U.S. Fifth Circuit Court of Appeals concluded that a non-jury trial in state court is not, in and of itself, offensive to the general maritime law:

> In view of the revised wording of the 'saving to suitors' clause and Supreme Court authority, *a jury trial is not a required element of a 'saving to suitors' remedy.*

964 F.2d at 1491 (emphasis added). Therefore, a Louisiana court having concurrent jurisdiction and presented with the issue of a seaman's release, is free to adopt such remedies – the exception of *res judicata* – and to attach such incidents – a judge determination in advance of trial – so long as the court applies the substantive maritime law of *Garrett v. Moore-McCormack*, applicable to Jones Act releases. This is precisely the effect of the trial court's January 22nd Decision and Order setting the exceptions for bench trial.

The Louisiana legislature's subsequent modification of article 1732 is not contrary to Respondents' reliance on *Parker* and *Linton*. The rationale of *Parker* and *Linton* remains valid for the proposition that the right of either

party to a trial by jury in a seaman's suit against his employer in state court is determined by Louisiana procedural rules. *Callais v. Vizier Inc.*, 2000 U.S. Dist. LEXIS 3326 p. 2 (E.D.La. 2000).

Actually, the Louisiana legislature's subsequent modification of article 1732 deleting subsection (6), supports the proposition advanced by Respondents that Louisiana procedure determines the availability of jury trials in Jones Act cases brought in state court. When enacting article 1732(6), the Louisiana legislature amended article 1732 to give a plaintiff/seaman the control of trial by jury in state court: "Louisiana apparently attempted to track the federal system and to give injured seamen who choose to file in state court the same choice of jury or bench trial as they would have in federal court." *Hahn v. Nabors Offshore Corp.*, 820 So. 2d 1283 (La. App. 3 Cir. 2002), citing, *Parker*, *supra*. However, by Acts 1999, No. 1363, § 1, the legislature deleted subsection (6) from article 1732, allowing either the plaintiff or the defendant to choose a jury trial in a state court Jones Act case. As a result, a Jones Act seaman does not have the same right to elect a jury or non-jury trial in a Louisiana court as he does in a federal court. *Hahn v. Nabors Offshore Corp.*, at 1284.

In *Hahn*, the injured seaman challenged the 1999 amendment as violative of his exclusive federal right to choose the mode of trial for Jones Act and general maritime law claims brought in state court. *Id.* While the Louisiana Third Circuit Court of Appeal did not question a seaman's exclusive right to choose a jury or non-jury trial in federal court, it held that the seaman's decision to bring his suit "in state court under the saving to suitor's clause," subjected his suit to state procedural rules which eliminated

his right to choose. With respect to the 1999 amendment to article 1732, the Third Circuit cited *Parker's* holding that "it is within the province of the states to establish their own rules for availability of jury trials" without modifying or displacing the essential features of the Jones Act and general maritime law. *Hahn* at 1285.

Other Louisiana appellate decisions establish that the application of the exception of *res judicata* to a seaman's release is not a novel concept in Louisiana jurisprudence. In *Dearman v. Mallard Bay Drilling Company, Inc.*, 616 So. 2d 866 (La. App. 3 Cir. 1993), the Third Circuit held that Louisiana's exception of *res judicata* was the proper procedural vehicle to determine the validity of a seaman's release in a Jones Act and general maritime law suit brought in Lafayette Parish pursuant to the saving to suitors clause. In that case, the plaintiff injured his back while working aboard defendant's jack-up vessel. Plaintiff contacted defendant requesting settlement, met with defendant's claims manager, negotiated and, while under oath before a court reporter, entered into a settlement for $22,500.00.

Subsequently, plaintiff hired an attorney and filed suit seeking damages under the Jones Act and general maritime law. Defendant filed an exception of *res judicata* to the claims of plaintiff on the basis that the seaman entered into a settlement and released all of his claims under the Jones Act and general maritime law. After an evidentiary hearing, the trial court sustained Mallard's exception of *res judicata* and dismissed plaintiff's suit. The Third Circuit held that the exception of *res judicata* was the appropriate procedural method for evaluating the seaman's release and that the trial court correctly sustained defendant's exception of *res judicata*. 616 So. 2d at 868.

Likewise, a seaman's suit, filed after settlement, was dismissed through an exception of *res judicata* by the trial judge in Jefferson Parish and the Louisiana Court of Appeal for the Fifth Circuit affirmed. *LeBlanc v. Callais, Inc.*, 767 So. 2d 823 (La. App. 5 Cir. 2000). In that case, plaintiff brought suit in state court under the Jones Act and general maritime law arising out of personal injuries allegedly sustained in a vessel collision. Prior to filing the suit in Jefferson Parish, the plaintiff had intervened in a federal court action regarding the same vessel collision and asserted a claim for loss profits. Plaintiff's claims in the federal court suit were settled before plaintiff brought his state court action. The state trial court maintained defendant's exception of *res judicata* based upon the plaintiff's settlement in the federal court suit. Affirming, the Fifth Circuit held that the exception of *res judicata* was the proper procedural device for determining the validity of the seaman's release under the appropriate federal maritime law. 767 So. 2d at 826. As demonstrated above, the trial court's hearing of the exception of *res judicata* under Louisiana Code of Civil Procedure article 929 neither conflicts with, nor displaces the substantive Jones Act or general maritime law.

In this suit filed in state court under the Jones Act, 46 U.S.C. § 688, and the "saving to suitors clause," 28 U.S.C. § 1333(1), federal maritime law does not preempt state procedural law. *American Dredging Co. v. Miller, supra.* State procedural rules apply in Jones Act cases brought in state court. *Milstead v. Diamond M Offshore, Inc.*, 676 So. 2d 89 (La. 1996) (applying the Louisiana standard of appellate review); *Cantrelle v. Kiva Const. & Eng., Inc.*, 630 So. 2d 265 (La. App. 1 Cir. 1993) (Louisiana may establish its own rules as to availability of jury trial in

Jones Act cases); *Dozier v. Ingram Barge Company*, 706 So. 2d 1064 (La. App. 4 Cir. 1998) (Louisiana procedural rules apply to the Jones Act prescriptive period); and *Morris v. M/V CREOLE BELLE*, 394 So. 2d 727 (La. App. 3 Cir. 1981) (Louisiana procedural rules govern default judgments in Jones Act cases).

An exception of *res judicata* neither conflicts with, nor displaces the substantive federal maritime standards governing the validity of a seaman's release. An exception of *res judicata* will be determined by the court. La. Code of Civil Proc. art. 929. Plaintiffs are "not denied a trial by jury in Louisiana simply because, under our Code of Civil Procedure, certain issues of law are either required or permitted to be disposed of by the judge alone in advance of the trial of the case." *Babineaux v. Pernie-Bailey Drilling Co.*, *supra* at 235; *see also, Shell Oil Co. v. Kennedy*, *supra*.

In an exception of *res judicata*, the party urging the exception of *res judicata* based on compromise bears the burden of proof with respect to the elements of the compromise. *Schmidt v. Doe*, 514 So. 2d 614 (La. App. 4 Cir. 1987). Likewise, under the general maritime law, the burden is upon the one who asserts the validity of a seaman's release to show that it was executed freely without deception or coercion, and that it was made by the seaman with a full understanding of his rights. *Garrett v. Moore-McCormack*, 317 U.S. 239 (1942). Accordingly, a hearing on the exception of *res judicata* will not infringe upon the substantive maritime law because the court will apply the maritime standards set forth in *Garrett v. Moore-McCormack*. A seaman may compromise his rights without prior judicial approval of the fairness of the

agreement. *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1160-61 (5th Cir. 1985).

Respondents acknowledge that the right to trial by jury is available for a maintenance and cure claim, as well as an unseaworthiness claim, when joined with a Jones Act claim. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). This concept is of no significance to the issue presented as the existence of a maintenance and cure claim does not afford a seaman any greater right to a jury trial. It is well-settled that claims for maintenance and cure, including future maintenance and cure, can be settled through a Jones Act release. *Law v. United Fruit Co.*, 264 F.2d 498, 500 (2nd Cir. 1959); *Zoldan v. American Export Isbrandtsen Lines, Inc.*, 302 F.Supp. 388, 391 (S.D.N.Y. 1969); *Braxton v. Zapata Offshore Co.*, 684 F.Supp. 921 (E.D.Tex. 1988); *Pereira v. Boa Viagem Fishing Corp.*, 11 F.Supp. 2d 151 (D.Mass. 1998); *Grace v. Zapata Offshore Co.*, 653 So. 2d 704 (La. App. 4 Cir. 1995). It is also established that a seaman's release may validly cover the subsequent development of a medical condition related to the injury but of which the seaman is unaware at the time of executing the release. *Simpson v. Lykes Bros. Inc.*, 22 F.3d 601 (5th Cir. 1994).

CONCLUSION

Respondents respectfully submit that the exception of *res judicata* is the appropriate procedural device for determining the validity of a seaman's release in advance of trial. State procedural rules apply to Jones Act cases brought in state court pursuant to the saving to suitors clause. *American Dredging Co. v. Miller, supra.* Louisiana

jurisprudence establishes that a plaintiff is not denied the right to jury trial by the hearing of a dispositive exception in advance of trial. Respondents have demonstrated that the Louisiana Supreme Court and the U.S. Fifth Circuit Court of Appeals have held that a non-jury trial in a Jones Act case brought in state court pursuant to the saving to suitors clause does not infringe upon the substantive Jones Act and general maritime law. A trial court is required by the Louisiana Code of Civil Procedure to hear a peremptory exception of *res judicata* and has the discretion to do so prior to trial on the merits. Accordingly, the trial court acted well within its judicial discretion in scheduling a hearing on the validity of the Petitioners' releases through Respondents' Exception of *Res Judicata* in advance of trial.

Respectfully submitted,

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